THE ALIENABILITY OF CHOSES IN ACTION: A REPLY TO PROFESSOR WILLISTON

IN a previous number of this REVIEW [1] I presented a view of the law relating to the alienability of *choses* in action at variance with that set forth by the late Dean Ames in his well-known essay entitled "The Inalienability of Choses in Action."[2] The conclusions

[1] 29 HARV. L. REV. 816.

[2] 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 580; reprinted in LECTURES ON LEGAL HISTORY, 210.

The intrinsic inalienability of *choses* in action asserted by Dean Ames is reasserted by Professor Beale in his treatise on the CONFLICT OF LAWS (1916), § 152, as follows:

"Transfer and extinguishment of rights of property. — It is a characteristic quality of rights of property that they continue in existence until extinguished by act of law or by destruction of the thing. Such a right must be capable of transfer, at least upon death, since the right is of a nature to outlast human life; and in fact in all civilized communities rights of property are also transferable *inter vivos*.

"A right is transferred when the transferee is put into exactly the same relation toward the thing that the transferor previously occupied. A transfer of title places the same title in the transferee; a transfer of possession puts the transferee in and the transferor out of possession.

"Rights in tangible things may of course easily be transferred, by consent of the parties; and the same is true of real intangible things. *In the case of commercial paper, a transferee takes the exact place of the transferor* by the very terms of the instrument.

"*Choses* in action, including contract rights and debts, are by their very nature incapable of transfer; for they are two-party relations, and the personalities of the parties are fundamental qualities of the relation. A new party could be inserted only by such a complete change in the nature of the obligation as would be a destruction of it and the creation of a new one; and this can be done only by mutual consent of both parties. Such a right, then, is incapable of transfer; it can only be assigned. An assignment is merely a contract that the assignee shall enjoy all the benefits of it, including that of suing. *It does not put the assignee into the position of the assignor*, or affect his right except collaterally."

See my former article, 29 HARV. L. REV. 818, for a discussion of the meaning of such statements. The assertion that the assignment "does not put the assignee into the position of the assignor" is obviously at variance with the decisions of the courts.

In the recent case of Portuguese-American Bank *v.* Welles, 37 Sup. Ct. Rep. 3 (1916), Mr. Justice Holmes said: "When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse." The learned judge was discussing, not whether ordinary *choses* in action were alienable, but whether an attempted express limitation

which I reached in that article may be stated briefly as follows: Common law *choses* in action, inalienable in the early days of English law, became in the final development of our law fully alienable, at law as well as in equity. The requirement that the suit be brought in the name of the assignor was retained, in the absence of statutes, but was merely a matter of procedural form. In other words, the conclusion was that complete ownership of a *chose* in action, both at law and in equity, was by an assignment, coupled with notice to the debtor,[3] vested in the assignee.[4] Questions relating to the effects of an assignment upon defenses of the debtor, rights of set-off, "latent equities" of third persons, etc., were left for discussion at a later time.

In a recent number of this REVIEW [5] Professor Williston dissents from my conclusions as to the character of the assignee's ownership of the *chose* in action and argues that it should still be regarded as *merely equitable.* In doing so, naturally he discusses both the points made in my article and those portions of the subject which I had left for later treatment. In what follows I wish both to give my reasons for still adhering to my views as to the character of the assignee's ownership of the assigned claim, and to discuss to some extent those portions of the law of assignment touched upon by

of the power to alienate would be valid. For a thorough analysis of the problems involved and citation of authorities, see the comment on this case in 26 YALE L. J. 304.

How Professor Beale comes to make the statement he does can be understood only by a very careful examination of his classification of rights into "static" and "dynamic." At the present time and place I can only say that what he calls "static" rights do not seem to me — if I understand his definition of them — to be jural relations and so ought not properly to be called rights at all. Even allowing for the unusual terminology used by Professor Beale, it seems clear that the attempted distinction between "static" and "dynamic" rights still leaves it difficult to reconcile his statements as to the alleged contrast between the alienability of negotiable paper obligations and that of ordinary *choses* in action.

[3] Before notice neither assignor nor assignee has complete ownership. 29 HARV. L. REV. 834. It is assumed also that the assignment is of the whole claim. Partial assignments will be discussed separately, as they were in my previous article. 29 HARV. L. REV. 836.

[4] 29 HARV. L. REV. 821–822.

Of course it is understood that there are certain classes of *choses* in action which are held to be inalienable on grounds of real or supposed policy. These are excluded from the discussion, which deals only with *choses* in action which are "assignable." Throughout the discussion it is also assumed that all the requisites of a valid assignment, including formal requisites, consideration, if that be necessary, etc., are present. The law relating to these questions is left for discussion at another time.

[5] 30 HARV. L. REV. 97.

Professor Williston but because of limits of space omitted from my former article.

If I understand Professor Williston's position, his argument may be divided into two parts. The first is based upon what he alleges to be the "fundamental characteristic" or "essential characteristic" of "equitable rights," "equitable obligations" or "equitable ownership" which differentiates them from "legal rights," "legal ownership" or "legal title."[6] The second part is based upon his belief that the recognition of legal ownership in the assignee would require us to attach to the assignment of a *chose* in action unfortunate jural effects [7] both upon the rights of set-off of the debtor and upon the "latent equities" of third persons and equitable interests of prior partial assignees. The jural effects which the learned writer asserts would, by inevitable logic or necessity,[8] follow from a recognition of the legal character of the assignee's ownership, he conceives to be not only unfortunate but also unsupported by legal principle or weight of authority. Without attempting to determine whether all these results would be so unfortunate as Professor Williston supposes, I shall attempt to show (1) that the part of the learned writer's argument which is based upon the alleged difference in the "fundamental" or "essential characteristics" of legal and equitable "rights" does not in any way disprove the validity of my conclusions; (2) that the jural effects which the learned writer deplores have no necessary or logical connection with the legal or equitable character of the ownership of the assignee, but that, on the contrary, the recognition of the assignee as owner by the court of law as well as by the court of equity is, so far as intrinsic necessity or logic is concerned, entirely compatible with all those jural effects of assignments of which the learned author approves.

[6] The phrases in quotation marks are all used by the learned writer at various points in his argument, apparently without any attempt to discriminate carefully, for example, between such phrases as "equitable right" and "equitable ownership" or "legal right" and "legal ownership." With the desire to be entirely fair to the argument of my learned critic, I have therefore in the text repeated them all.

[7] In another place (15 COL. L. REV. 228) I have called attention to the fact that there is no term in common use to describe the consequences or effects of given facts both at law and in equity. "Legal effects" suggests that common law effects only are included. In this article I have adopted the phrase "jural effects" to cover both "legal effects at common law" and "legal effects in equity."

[8] See 30 HARV. L. REV. 101, 102, 104, 107, for the passages in question. They will be discussed in detail below.

I

At the outset I find myself under the necessity of pointing out certain misconceptions of my position under which Professor Williston apparently labors. In the opening sentence of his article my learned friend says:

"The interesting article by my friend, Professor Cook, in a recent number of this REVIEW, on the alienability of *choses* in action, leads me to make some suggestions in opposition to his argument that the assignee of a *chose* in action should be regarded as having *a legal rather than an equitable right.*" [9]

With all deference to Professor Williston, and in full recognition of the fact that he had no desire or intention to misstate my argument, I must hasten to say that this appears to me to be not merely an inadequate but also an erroneous statement of my conclusions. Moreover, it betrays at once the chief reason for the learned writer's dissent, *viz.*, that he has failed to follow the essential features of the analysis presented in my article and so has failed to understand what my conclusions really are. This failure naturally renders him quite unconscious of the fact that he is ascribing to me views which I have never entertained for a moment.

In order to clear up this misapprehension of my conclusions, in which some of the readers of Professor Williston's argument may naturally share, the present article will first of all point out specifically the ways in which the learned writer has misstated my position, and in doing so will restate and emphasize those portions of my analysis the overlooking of which has, it seems, led my critic into the error referred to.

In the first place, nowhere in my former article is it stated that the assignee ought to be regarded as having merely "*a* legal *right.*" Even a superficial reading of my argument will disclose that it is based fundamentally upon the proposition that the "ownership" of a *chose* in action is a complex aggregate of jural relations and that the word "right" is entirely inadequate to describe the aggregate of rights *and other jural relations* which, according to the decisions of the courts, are vested in the assignee by virtue of the assignment. In my own thinking I have found it impossible to get along either

[9] 30 HARV. L. REV. 97. The italics are those of the present writer.

with one fundamental legal conception — "right" — where several are needed, or with one word to describe several fundamentally different jural relations. The criticism of my learned friend has convinced me more strongly than ever of the absolute necessity for both an exact, scientific analysis of fundamental legal conceptions and an equally exact and scientific terminology.[10] Limits of space and time compel me to refer the learned reader to the article by my colleague already referred to for an adequate exposition of the fundamental conceptions and terminology which seem to me to be necessary to any adequate discussion of our problem. A detailed application of that analysis and terminology to the concrete problem of assignments is found in my original article.[11]

Stated in the terms of that analysis and terminology, my conclusions as to the jural character of the assignee's interest in the assigned claim may be restated briefly as follows: In the ultimate development of the common law, the assignee of a common law *chose* in action is in a court of law, after notice to the debtor, vested with all the rights, privileges, powers and immunities which go to make up that aggregate of jural relations commonly called the "legal ownership" of the *chose* in action; and, correspondingly, the assignor no longer is vested with the rights, privileges, powers and immunities which constitute so-called "legal ownership." As long ago as 1801 James Kent, then a Justice of the Supreme Court of New York, in deciding a case involving the legal effects of the assignment of a judgment, expressed the same idea clearly, in the following words:

"The assignee of the judgment is to be recognized by this court, as *the owner*, and all acts of the plaintiff [assignor] subsequent to the assignment, and affecting the validity of the judgment, were fraudulent. He has no more power over the judgment than a stranger." [12]

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[10] The attention of the learned reader is called, as it was in my former article, to the fact that the fundamental analysis and terminology used is that set forth by my colleague Professor Hohfeld, in his article on "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 YALE L. J. 16. Without an analysis similar to that there presented I do not see how legal problems of any sort can be adequately analyzed.

For an application of the analysis to the field of contract, see the article on "Offer and Acceptance" by my colleague, Professor Corbin, 26 YALE L. J. 169.

[11] 29 HARV. L. REV. 819–821.

[12] Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 258, 260 (1801).

An eminent Connecticut judge in an able opinion was equally emphatic in 1818:

"It is a well-settled principle of *common law* in Connecticut that *the property* in a *chose* in action may be assigned; and *courts of law have long since recognized the property in the assignee as fully as courts of chancery.*" [13]

As a corollary to my main proposition, it follows that the requirement that the suit in the common-law court be brought in the name of the assignor was substantially only a formality, demanding that a certain kind of title be given to the action; it did not as a rule affect the substance of things. On this point the able judge last quoted said in the same opinion:

"The *old form* of bringing the suit in the name of the obligee, is, indeed, continued; but it *is now mere form.*" [14]

From this summary of the conclusions presented in my original article the learned reader will see clearly the inadequacy of the statement that I argue "that the assignee . . . should be regarded as having *a* legal rather than an equitable *right.*"[15] It ignores absolutely that very complexity of the jural relations involved which was not merely emphasized in my former article but made the very basis of my whole analysis and argument.

That this statement besides being inadequate as a description of my conclusions is also (though unintentionally so) quite misleading appears when we notice that it makes me argue that "the assignee . . . should be regarded as having a legal *rather than* an equitable right."[16] Even if there be substituted for "a legal right" the words which I used, *viz.*, "an aggregate of legal rights, privileges, powers and immunities," and for "an equitable right" the words "an aggregate of equitable rights, privileges, powers and immunities," the statement would still be a misdescription of my conclusions. It is not contended at any point in my article that the jural relations which go to make up the assignee's ownership of the claim became *exclusively* legal. Nowhere is it asserted that equity

[13] Smith, J., in Colbourn *v.* Rossiter, 2 Conn. 503, 508 (1818). The italics are those of the present writer.

[14] See a longer extract from the opinion, 29 HARV. L. REV. 830.

[15] The italics are those of the present writer.

[16] The italics are those of the present writer.

ceased to recognize the assignee as being the "owner" of the *chose* in action. The whole argument is that the rights, privileges, powers and immunities of the assignee become *legal as well as equitable*, instead of exclusively equitable. In my argument it is first pointed out that apparently there was a time in English legal history when the assignee's "ownership" of the claim was exclusively equitable.[17] It is then shown how by degrees the common law, adopting the equitable view, ultimately came to recognize the assignee as owner.[18] Of any view that equity ceased to regard the assignee as owner, because of this recognition of him by the common law court, there is no hint in anything that was said. Indeed, the following extract from the opinion by Smith, J., already referred to, quoted in my original article, shows that quite the contrary was intended:

"I speak not of *chancery, merely.* It is *the same at law.* There is *no hostility* between the different jurisdictions on this subject. . . . The courts of law have long since recognized the *property* in the assignee *as fully as courts of chancery.*" [19]

Surely if this means anything it means that the ownership of the assignee is *concurrently legal and equitable, i. e.*, recognized and sanctioned both by common law and by equity. In view of prevailing modes of thought and use of terms, however, it is necessary to explain exactly what is meant by saying that a given jural relation is concurrently legal and equitable. This demands some consideration of the relations between law and equity as well as of the nature of legal and equitable rights and other jural relations.

II

Commonly jural relations are classified as either "legal" or "equitable." The fact that many jural relations are *concurrently legal and equitable* is not usually recognized.[20] By the statement that a jural relation is concurrently legal and equitable is meant simply that it is recognized as valid and so is sanctioned by both courts. To apply this concretely to the case of assignments of *choses* in action, let us consider, for example, the jural relations

[17] 29 HARV. L. REV. 822. [18] 29 HARV. L. REV. 824–28.

[19] 2 Conn. 503, 508 (1818). The italics are those of the present writer.

[20] An accurate analysis of the situation is presented by Professor Hohfeld in his article upon "The Relations between Equity and Law," 11 MICH. L. REV. 537.

which arise upon the assignment of a common law debt. The *right* of the assignee to have the debtor pay the money to him, and the correlative *duty* of the debtor to pay the money to the assignee, are concurrently legal and equitable, not merely legal or equitable. That is, both courts recognize and sanction the right of the assignee and the duty of the debtor. To be sure, ordinarily the assignee may not sue the debtor in equity, either in his own name or that of the assignor, for the reason that he has an adequate remedy at law.[21] It by no means follows that the right and its correlative duty are exclusively or purely legal, although that is commonly assumed. An accurate analysis shows that the right and duty are recognized and sanctioned by equity as well as by law. By refusing to interfere by injunction with the assignee's suit in a law court for the collection of the claim, the court of equity "indorses and sanctions the remedial proceeding in the law court," [22] and so the right itself. If the view of equity were that the debtor's duty to pay is not in equity as well as at law owed to the assignee but to someone else — the assignor, for example — an injunction to stop the assignee from collecting the claim by means of a common law proceeding would be the normal thing. Moreover, when occasion arises equity stands ready to aid the assignee if for any reason the effective assertion of his right to payment requires such aid.[23] For example — referring now to the time when the testimony of parties to an action could not be had in a common law court — if to establish his right the assignee needed testimony from the debtor, equity would enable the former to obtain it by bill of discovery, brought in aid of the action at law.[24] So also if the assignee held the *chose* in action in trust for someone else and refused to enforce it for the benefit of the *cestui*, the latter could proceed directly by bill in equity against both assignee and debtor and compel payment by the latter.[25] Where because of defects in the common law — due chiefly to the technical rule requiring the action to be entitled with the name of the as-

[21] Hammond *v.* Messenger, 9 Sim. 327 (1838); Hayward *v.* Andrews, 106 U. S. 672 (1882). The latter case contains a review of the leading American authorities.

[22] Hohfeld, 11 MICH. L. REV. 569.

[23] *Cf.* the examples given by Hohfeld, *loc. cit.*

[24] Of course to-day the modification of the common law rules of evidence usually renders such a course unnecessary.

[25] Fogg *v.* Middleton, 2 Hill Ch. (S. C.) 591 (1837), and cases cited in AMES, CASES ON TRUSTS, 2 ed., 67.

signor — the assignee could not sue at law, he could sue directly in equity in his own name.[26]

A careful consideration of the other jural relations involved — the privileges, powers and immunities of the assignee — will show that they also are not exclusively legal[27] or exclusively equitable, but concurrently legal and equitable in the same sense. It is, for example, the *privilege* of the assignee to release the claim if he wishes, with or without receiving a consideration; he is under *no duty* to the assignor or others not to release, *i. e.*, they have "*no right*"[28] that he shall refrain from releasing. That the assignee has this privilege at law is shown by the fact that neither the assignor nor anyone else has a cause of action against him if he does execute a release. That the privilege is also equitable, *i. e.*, recognized and sanctioned by equity, is obvious, for clearly equity would not only refuse to enjoin him from releasing if he had not yet done so but also hold him guiltless of any wrong if he had. To assert that the privilege was not equitable as well as legal would be to assert that in equity as distinguished from law he was under a duty to someone — presumably the assignor — not to release. If so, equity would at the instance of the one to whom the duty was owed grant an injunction to stop the giving of the release or, if it had been given, order its surrender and cancellation or give such other relief as the occasion demanded.[29] Consideration of the other *privileges* of the assignee, with their correlative "*no-rights*" of others, shows that they are concurrently legal and equitable.[30]

The *powers* of the assignee and their correlative *liabilities*[31] are also concurrently legal and equitable. For example, the *power* of the assignee to give a valid release to the debtor is recognized by both law and equity. If it were not concurrently legal and equitable, but merely legal, the chancellor would of course refuse to

[26] Person & Marye *v.* Barlow, 35 Miss. 174 (1858).

[27] "Exclusively legal" and "exclusively equitable" jural relations are considered more carefully at a later point in the discussion.

[28] See the discussion of "no-rights" by Hohfeld, 23 YALE L. J. 32.

[29] Compare the situation in early days when payment of a bond did not *per se* discharge it at law unless it were so conditioned.

[30] For example, the privilege to transfer the claim to anyone else; the privilege not to enforce the claim by suit and thus to permit the statute of limitations to run, etc.

[31] See the scheme of jural "opposites" and "correlatives" in 23 YALE L. J. 30. One may of course have the *power* to do a thing and not the *privilege* of doing it.

recognize the validity of the release. An example of a situation of this kind is found in the case of a partial assignment. At law — at least in those jurisdictions in which the partial assignee's rights, etc., are purely equitable [32] — the assignor has a legal *power* to extinguish by release the whole claim. In equity, however, the claim is not recognized as extinguished, *i. e.*, the partial assignee can recover from the debtor the amount assigned to him.[33] The power of the assignor to release the claim in such a case is therefore exclusively legal.[34]

Finally, the *immunities* of the assignee and their correlative *disabilities* [35] are concurrently legal and equitable. Again a single concrete example must suffice for illustration. Suppose — after notice to the debtor of the assignment — the assignor were to execute under seal a release of the claim. This release would be without jural effect upon the validity of the claim, either at law or in equity. The assignor has no power, *i. e.*, is under a *disability*, both at law and in equity, to extinguish the claim; the assignee enjoys an *immunity* from having the claim extinguished in this way. If the *immunity* of the assignee, with its correlative *disability* of the assignor, were exclusively legal, the following situation would result: At law, since the assignor lacked the power to release, the release would be invalid and the claim still in existence; in equity, on the other hand, since by hypothesis the immunity in question does not exist, and so a power in the assignor to give a valid release is recognized, the claim would no longer be valid. Under such circumstances the chancellor would both refuse to aid in the assertion of the assignee's legal rights and also in a proper case compel the assignee to refrain from exercising his legal rights and even to surrender them.[36] The other immunities of the assignee — *e. g.*, from having the assignor

[32] Whether the partial assignee's ownership of the claim is concurrently legal and equitable or exclusively equitable is discussed later.

[33] AMES, CASES ON TRUSTS, 2 ed., 64.

[34] This was the situation in the case of total assignments at one period of the development of our law. The assignor could at law give a valid release, which however was not regarded as valid in equity.

[35] 23 YALE L. J. 30.

[36] Compare the situation which results when a *cestui* "releases" a claim against a third person held in trust. Equity would enjoin the trustee from asserting the claim at law, as well as refuse him equitable aid if he asked for it in what would otherwise be a proper case for equitable relief. The release would be valid in equity but not at law.

or anyone else transfer the claim to others [37] — prove to be concurrently legal and equitable if we examine them closely. Time and space, however, do not permit of such examination.

From every point of view, then, we may say with the eminent judge already quoted, "It is the same at law" as it is in equity; "there is no hostility between the jurisdictions on this subject." [38]

III

Now that the conclusions set forth in my original article have been carefully restated and the misconceptions due to my learned critic's misunderstanding of them removed, we may turn our attention to the argument against their soundness. As already stated, it is based in part upon certain assumptions concerning the "essential characteristic" or "fundamental characteristic" of "equitable rights," "equitable obligations" or "equitable ownership" as distinguished from "legal rights," "legal ownership" or "legal titles." Professor Williston says:

"In discussing equitable rights there is always danger of confusion between the *essential character* of the *right* and *the tribunal* in which it is enforced. The fundamental characteristic of an equitable obligation is that it binds primarily a particular person, and binds others only when their relation to that person is such that in conscience they should be subject to his duties. The Court of Chancery has been the tribunal where such duties have ordinarily been enforced. But even in jurisdictions where the distinction between legal and equitable courts is still preserved, courts of law to-day enforce a great variety of equitable rights and duties without thereby changing their essential characteristics. To call such rights *legal in antithesis to equitable* merely because a court of law enforces them, is a natural tendency but a dangerous one. Of course no such confusion exists in the argument of Professor Cook. His view seems to be that the extent of the powers of the assignee of a *chose* in action involves the conclusion that he has more than that personal right which is typical of equitable ownership and should rather be designated as a legal owner, his ownership being qualified, to be sure, by certain limitations, as legal ownership often is." [39]

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[37] If no notice has been given to the debtor, the problem of the rule in Dearle *v.* Hall, 3 Russell 1, 48 (1827), is raised. See discussion below.

[38] The method of sanctioning the particular jural relation may well be different, at law and in equity, as has been pointed out.

[39] 30 HARV. L. REV. 97–98. The italics are those of the present writer.

If it be "confusion" to attach to the word "right" the adjective "legal" when the right in question is recognized and sanctioned by a court of law, and the adjective "equitable" when the right is recognized and sanctioned by a court of equity,[40] I must plead guilty to being hopelessly confused, for that is precisely the way in which I have always used these terms. This seems to me to be not only their natural meaning but also the only really useful one to attach to them. To me the confusion appears to lie in the minds of those who assert that there is some "fundamental" or "essential" characteristic of "equitable rights" — aside from the fact that they are recognized and sanctioned by courts of equity — which differentiates them from all other classes of "rights" and requires us to regard them not merely as equitable but as *exclusively equitable* and *not legal*, even after they have come to be fully recognized and sanctioned by courts of law as well as by courts of equity. If I understand Professor Williston, just that is what he wishes us to say concerning the assignee's "rights"; they are *equitable, not legal.*[41]

To deal with the matter adequately we must go somewhat more fully into the relations between law and equity and "legal" and "equitable" jural relations than we have done. As Professor Hohfeld has shown in the article previously referred to,[42] all *genuine* jural relations in our system of law fall into two classes. The first consists of jural relations which are *concurrently legal and equitable;*[43] the second of those which are *exclusively equitable.*[44] What appears at first sight to be a third class, *viz.*, jural relations *exclusively legal*, is found upon analysis to consist of jural relations which are, so far as *genuine* law is concerned, only apparent.[45] That is, if we take our

[40] In states where law and equity are "merged," the distinction to-day between the court of common law and the court of equity is chiefly between a tribunal with a jury and one without, with a different kind of appellate review, at least in cases where the sole relief sought is the payment of money. The equitable decree for the payment of money is enforced precisely like the common law judgments — in fact both are called judgments under the code procedure.

[41] 30 HARV. L. REV. 99.

[42] Note 20, *supra.*

[43] In the sense set forth above.

[44] The classification here adopted has of course no connection with the well-known classification adopted by Story and others dividing the jurisdiction of equity into concurrent, exclusive, and auxiliary.

[45] Hohfeld, 11 MICH. L. REV. 569.

whole system of law into account, we find that every exclusively legal jural relation is in conflict with some paramount exclusively equitable jural relation which has the effect of annulling the legal jural relation in question.[46] If this were not true, *i. e.*, if the equitable relation properly enforced did not in effect supersede and render of no effect the legal relation in question, the latter would not be exclusively legal but concurrently legal and equitable, *i. e.*, would be recognized and sanctioned by both courts.

It follows that rights and other jural relations which are commonly called and assumed to be "legal" as distinguished from "equitable" are really of two kinds. The first are genuine jural relations, concurrently legal and equitable, *i. e.*, recognized and sanctioned by both law and equity; the second are only apparent and are not genuine jural relations, since, being exclusively legal, they are in conflict with some paramount exclusively equitable jural relation which has the effect of annulling them.

Unfortunately the terminology in current use is not based upon a careful analysis of the situation. Professor Williston's misunderstanding of my former article — in which, perhaps unfortunately, I forbore introducing new terms — has convinced me that no progress can be made without the adoption of a terminology adequate to express clearly the relations between legal and equitable jural relations as they actually exist. It seems desirable, therefore, to adopt the phrases suggested by Professor Hohfeld, *viz.*, "concurrently legal and equitable," "exclusively equitable" and "exclusively legal" in classifying jural relations. That will be done in what follows. It must constantly be borne in mind that a jural relation which is *exclusively legal* is *not* a *genuine* jural relation at all; also that to say merely that a given relation is "legal" or "equitable" does not mean that it is exclusively so — it may be concurrent.

Coming now to the discussion of the passage quoted from Professor Williston's argument, it is obvious of course that he does not mean by "equitable right" a jural relation that is recognized and sanctioned exclusively by a court of equity, for he insists upon calling rights enforced by courts of law "equitable, not legal." A right which he would call "equitable, not legal" might, therefore, in the

[46] Many concrete illustrations are given in 11 MICH. L. REV. 555. Of course if the appeal is not properly made to the equity court, the action at law prevails.

terminology here adopted be either concurrently legal and equitable or exclusively equitable.[47]

An attempt on my part to formulate for my own satisfaction the argument of my learned friend into a series of definite propositions has yielded the following result. I have reached it by considering both the general trend of his article and particular phrases used at different points in it. Except where quotation marks are used, the phraseology is mine. I can only hope that it does not misrepresent in any material way what he has said.

1. "An equitable ownership" or "an equitable title" is "an equitable right" with a correlative "equitable obligation."

2. Every "equitable right" is "primarily personal," *i. e.*, it has the "fundamental" or "essential characteristic" that "it binds primarily a particular person, and binds others only when their relation to that person is such that in conscience they should be subject to his duties."[48]

3. Not only do all "equitable rights" have this characteristic, but every "right" which has this characteristic is "equitable, not legal," no matter in what court it is recognized and sanctioned.[49]

4. The "right" or "ownership" of an assignee of a *chose* in action has this characteristic and is therefore "equitable, not legal" even though now fully recognized and sanctioned by courts of law.

It is apparent that to Professor Williston "rights" are either legal *or* equitable. The conception of "rights" as concurrently legal *and* equitable seems to have no place in his analysis.[50] It will at once be seen that we are dealing, in part at least, with a question of terminology. However, this difference in terminology is not merely a question of choosing one rather than another of a number of non-significant labels, any one of which would serve the purpose equally well. Behind terminology lie concepts; behind confusion in terminology lies confusion in concepts.

As Professor Williston himself says:

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[47] Possibly it might be exclusively legal if it had the "fundamental characteristic" described but were recognized and sanctioned only in a court of law.

[48] 30 HARV. L. REV. 97.

[49] This seems to be the fair meaning of Professor Williston's argument, although I think it is not expressly stated.

[50] This, although not explicitly stated, seems fairly to be inferred from the whole argument and such phrases "as legal in antithesis to equitable" (30 HARV. L. REV. 97) and similar statements.

"Words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas. . . . And more than one court has been led into the error of holding. . . ." [51]

Undoubtedly the really important difference between my learned critic and myself is in the matter of fundamental jural concepts. It is because Professor Williston does not recognize that rights and other jural relations may be at the same time both legal and equitable that he fails to see that to say that a right is legal is not necessarily to say that it is exclusively legal and so not equitable. As I have tried to show above, his misunderstanding of my conclusions is due in part to this antithesis between legal and equitable "rights" (jural relations) which seems ever to be present in his mind. The same cause leads him to say that the courts of law, when they came to sanction fully the ownership of the assignee, did so, "still recognizing . . . that his ownership was equitable, *not legal.*" [52] The only opinion which he cites in support of that proposition is that in *Winch* v. *Keeley*.[53] All that was there said, however, was that the common law now recognized and enforced rights which were formerly enforceable only in equity, *i. e.*, the opinion recognized that the assignee's "rights" were equitable. It did not state that they were not also legal, and the plain truth of the matter seems to be that in any natural meaning of the terms they are both legal and equitable and not exclusively equitable.

In other words, Professor Williston has two terms — legal and equitable — to express two supposedly mutually exclusive funda-

[51] "The Repudiation of Contracts," 14 HARV. L. REV. 425.

"If terms in common legal use are used exactly, it is well to know it; if they are used inexactly, it is well to know that, and to remark just how they are used." JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE, 190.

"This does not mean that the effort for clear thought and exact statement can be relaxed. Rather the contrary; for the very breadth of the subject has made it easy to hide confusion of thought behind ambiguous and question-begging phrases." Dean Ezra Ripley Thayer, 27 HARV. L. REV. 318.

"The student of Jurisprudence is at times troubled by the thought that he is dealing not with things, but with words, that he is busy with the shape and size of counters in a game of logomachy, but when he fully realizes how these words have been passed and are still being passed as money not only by fools and on fools, but by and on some of the acutest minds, he feels that there is work worthy of being done, if only it can be done worthily." JOHN CHIPMAN GRAY, NATURE AND SOURCES OF LAW, viii.

[52] 30 HARV. L. REV. 99.

[53] 1 T. R. 619 (1787). See the passage quoted in 30 HARV. L. REV. 99, n. 3.

mental concepts. In his analysis, these two concepts cover the whole field; there is no room for a third. In the analysis which I am following, there are three fundamental concepts and three terms which correspond to them — exclusively legal, exclusively equitable, and concurrently legal and equitable.

Let us now examine the truth of the propositions in which I have attempted to summarize the fundamental parts of Professor Williston's argument. The first and second treat "equitable ownership" as an "equitable right" or "obligation" "primarily personal." This is, of course, the view maintained by the late Dean Ames, by Maitland, and others. To discuss it adequately would require far more space than can be given to it here, and a few words must suffice to indicate what to the present writer seems to be its fundamental weakness, *viz.*, that it is based upon a totally inadequate analysis of the fundamental jural relations involved in "ownership," whether the latter be concurrently legal and equitable or exclusively equitable.

Professor Williston's similar statement that "legal ownership is conceived fundamentally as *a right* good as against all the world" shares the same weakness. All statements of this kind which describe ownership merely as *a right* ignore totally the complex character of the jural relations involved. For the sake of simplicity, let us consider so-called "legal ownership" [54] first. A., for example, owns a chattel, free from any legal or equitable claims. It requires only a slight consideration to see that to say that A. has *a right* is insufficient. In the first place he has, not one right, but many rights. Commonly we express this by saying that he has a right *in rem*, but that expression is misleading unless very carefully defined.[55]

[54] This is of course concurrently legal and equitable where the property is owned absolutely, *i. e.*, not held in trust.

[55] The briefest consideration shows that we are dealing not with one right but with a multiplicity of rights, actual and "potential," meaning by the latter term that only a portion of the operative facts necessary for the existence of an actual right which can be violated are as yet in existence. Consider, for example, the situation in Rylands *v.* Fletcher, L. R. 3. H. L. 330 (1868). If (as, apparently, later decisions show) the rule applies only as between neighboring landowners, what is the situation before the water has been collected on the land? The right to have it kept off is potential, but becomes actual as soon as it has been collected. Whatever this right may be called, it is a part and only a part of a complex aggregate of rights which the land owner has. Consider the rights of the owner of a sheep. If no one in the jurisdiction owns a dog, it is difficult to conceive of the owner of the sheep as having an actual right against anyone

In addition, however, he has many privileges,[56] powers[57] and immunities.[58] If the so-called "legal ownership" is a genuine ownership, all the jural relations that are legal are also equitable, *i. e.*, concurrent. A complete analysis would show also that the complete ownership of the flock of sheep includes also jural relations exclusively equitable.[59] If we should modify Professor Williston's statement concerning "legal ownership" so as to make it read that "legal ownership" is conceived fundamentally as *including* a right "good against all the world" [60] it would be nearer the truth. The particular "right" Professor Williston seems to have in mind here is the "right" to recover the chattel from anyone into whose hands it may come. Even then as applied to chattels it would not be true in the original home of the common law, for the chattel could not be recovered from a purchaser in market overt. Nor would it be true of "legal ownership" of real estate acquired under an unrecorded deed in jurisdictions having recording acts.[61]

It must not be overlooked that in the cases just discussed the "legal owner" of the chattels or land has other "rights" which are "good against all the world." If, for example, the sheep have been stolen by a thief, the right of the owner to immediate possession will support an action of trover for the conversion of the sheep

that dogs shall not injure the sheep. As soon as a number of persons do have dogs, however, and know of their propensity to injure sheep, the rights against such persons are actual; but as against all others in the jurisdiction, the owner's rights are potential. All of these rights are only a small part of the so-called right *in rem*. Consider another case. When A. is in New York and B. in Buffalo, can we say that A. has an actual right not to be assaulted by B.? Or must we say that the right is only "potential" until the physical possibility of a battery arises? It is not intended to answer these questions at this time, or to do more than to point out how superficial and misleading the present analysis and classification of rights into rights *in rem* and rights *in personam* really is. It is to be hoped that soon someone will give us a more careful analysis as well as a more scientific terminology.

[56] For example, the privilege to do all kinds of acts by way of using the chattel, selling it, mortgaging or pledging it, giving it away, etc., etc.

[57] For example, to transfer title by delivery, by deed; to pledge the chattel, or to mortgage it, etc., etc.

[58] For example, no one else has the power to transfer the ownership unless empowered to do so by appointment as agent or under valid execution process, etc.

[59] For example, the power to give an equitable mortgage without creating any legal interest.

[60] Of course no right is good against "all the world." It may be good against an indefinite number of people or people generally. See the discussion in my article in 15 COL. L. REV. 40–44.

[61] See the discussion of the recording act cases, *infra*, n. 87.

against anyone who steals them from the first thief, or who takes by gift from the first thief, etc.

From all this we may conclude that "legal ownership" must be conceived of as a complex aggregate of rights and other jural relations, and that the "right" which my learned critic apparently has in mind, *viz.*, to recover the chattel or land from persons into whose possession it has come, need not be good "against all the world" in order that the ownership be "legal." It seems clear that whoever disputes the last statement must be prepared to maintain that legal ownership of chattels never existed in England and that it does not exist to-day in the case of land under the recording acts.[62]

Referring now to Professor Williston's statements as to "equitable rights," is it really true to-day that the essential characteristic of "an equitable right" is that it is "primarily personal," *i. e.*, "binds primarily a particular person"? However true this may have been historically, does such a statement adequately describe the law of to-day when, as Professor Williston himself points out, "an equitable right" or "ownership" which is recorded includes "rights good against all the world" and may be "much more comprehensive" than "legal ownership?"[63] Apparently Professor Williston is willing to maintain that it does, arguing that "the same result" is reached by law and equity but by different roads.[64] If, as my learned critic seems to admit, the jural results at law and in equity are identical,[65] it is difficult to see how the "rights" of "equitable ownership" can be *fundamentally* different in their essential characteristics from those of "legal ownership." Moreover, as the learned author himself says, the reasons why "equitable rights" are available against particular persons or groups of persons are in the last analysis the same as those which lead us to make "legal rights" available against the same persons.[66]

[62] There are many statutory modifications of "legal ownership" which apply the doctrine of innocent purchase for value so as to limit still farther "legal ownership" in ways unknown to the common law. Examples are found in the Factor's Acts, Uniform Bills of Lading Act, Uniform Warehouse Receipts Act, etc.

[63] 30 HARV. L. REV. 98.

[64] 30 HARV. L. REV. 99.

[65] I do not intend either to deny or admit the truth of the admission that the results are "the same," *i. e.*, *identical*. It is too large a subject to treat here.

[66] Doubtless the reasons which actually influenced courts of equity to establish the doctrines in question were not those which we to-day give as their justification.

In any event, a careful analysis of so-called "equitable ownership" will show that it is not primarily *a right*, but that, like "legal ownership," it is a complex aggregate of rights, privileges, powers and immunities,[67] and any treatment of the subject which ignores this is, to say the least, inadequate.

It may be noted in passing that the learned writer's statement as to the fundamental characteristic of "equitable rights" is not true of those jural relations which are commonly assumed to be merely "legal" but which are in fact concurrently legal and equitable. Since all legal jural relations which are genuine are of this character, it is obvious that many genuine jural relations which are equitable (but at the same time legal) are good "against all the world." For example, the right of an owner of land in possession to have "all the world" refrain from trespassing is equitable as well as legal. As an equitable right it is as much a "right *in rem*" as it is in its aspect as a legal right. Undoubtedly it was not of equitable rights of this kind that Professor Williston was writing, but only of those which originated in equity. Many of these are of course now concurrently legal and equitable; others are still exclusively equitable. It is to all of these, as I understand it, that Professor Williston attributes the characteristic referred to.

Even if it were to be admitted — merely for the sake of argument, but without actually determining the truth — that all the "rights" which historically were exclusively equitable in origin did possess in the beginning some such characteristic as that described by Professor Williston, it does not follow that they *necessarily* lost this characteristic when in the course of the development of our law they came to be recognized and sanctioned by courts of law, *i. e.*, became concurrently legal and equitable. There is no *inherent* reason why the chancellor should change his views as to their scope, or why the law court, recognizing their historical origin, may not give them precisely the same limitations they previously had when exclusively equitable.[68] Neither does there seem

[67] A *cestui que* trust has many *privileges*, for example, ordinarily he has the privilege of transferring his interest. He also has a *power* to do the same thing. If the instrument creating the trust is recorded, his *immunity* from having his "ownership" destroyed is as complete as that enjoyed by "legal owners." If it is not recorded, this immunity is not so complete. He has of course other immunities, *e. g.*, no one else can transfer the "equitable interest" to others.

[68] It is extremely important therefore to know the history of a particular doctrine

to be any good reason why they should not be called what they are — concurrently legal and equitable.[69]

Professor Williston's conception of all jural relations as either legal or equitable and his failure to recognize that many of them are concurrently legal and equitable leads him to assert that so long as the common law procedure required the assignee to sue in the name of the assignor

"it was hardly possible to argue, and it was not argued, that the assignee was legal owner of the right";[70]

also that

"all the powers and rights upon which Professor Cook relies . . . may belong to the assignee whether the court travels on the theory that he has a legal ownership or on the theory that he has a legal power to collect but only equitable ownership." [71]

Nevertheless, so far as concerns the first of these statements, the "impossible" was achieved by Kent, C. J., in 1801; by Smith, J., in 1818, as is shown by the extracts printed above. Nor are these isolated instances, as others cited in the footnote will show.[72]

If I have made my argument down to this point entirely clear, the incorrectness of the second statement ought to require no demonstration. "The legal power to collect" is only one among the many jural relations which at law as well as in equity are vested in the assignee. The privilege and the power to release gratuitously; the privilege and power to transfer to others; the immunity from a power of the assignor, or anyone else to do these things — all these and many other jural relations [73] are recognized as vested in the assignee by courts of law as well as of equity. To call the "power to collect" "legal" but to deny the same name to these other jural

if we are to be in a position to discuss the real problem involved in a discussion of its scope and limitations.

[69] If all that Professor Williston means is to insist that whatever limitations the assignee's "rights" had when purely equitable they should continue to have when they become concurrent, there is little occasion for controversy between us. Apparently however he means much more.

[70] 30 HARV. L. REV. 100.

[71] *Ibid.*

[72] Parris, J., in Hackett *v.* Martin, 8 Greenl. (Me.) 77, 78 (1831); Morrow *v.* Inhabitants of Vernon, 35 N. J. L. 490 (1872); Bouvier *v.* Baltimore & N. Y. Ry. Co., 67 N. J. L. 281, 293, 51 Atl. 781 (1901); Bird *v.* Caritat, 2 Johns. (N. Y.) 342 (1807).

[73] For example, the *right* to have the sheriff levy execution for the assignee's benefit.

relations which are also recognized and sanctioned by courts of law seems inconsistent, to say the least. At the risk of tedious repetition, let me repeat: *According to the decisions of the courts*, all the jural relations which before the assignment were vested in the assignor have ceased to be so vested, and on the other hand the assignee has become by virtue of the assignment invested with all the jural relations which go to make up what we call "ownership" of the *chose* in action. There remains a false appearance of ownership in the assignor because of the requirement that the assignee's action in a court of law bear a misleading label, *viz.*, the name of the assignor.

That the label on the action was a mere procedural form was, I think, clearly shown in my previous article.[74] As apparently Professor Williston was not convinced and others may share his doubts, a few additional cases may perhaps be cited with profit. In *Matherson* v. *Wilkinson*[75] the suit was brought in the name of the assignor. It appeared that because of his failure to comply with a statute the assignor could not sue. It was therefore argued that the assignee could not sue in the assignor's name. If the assignee had only a "power to collect" a claim, the "legal ownership" of which was vested in the assignor, it seems clear the objection was well taken. The court, however, brushed it aside, saying that the debt was "no longer the property" of the assignor; that the latter did "not own the claim after selling it and assigning it." Other courts on similar facts reach the same conclusion.[76]

In other fields of the law there are many similar requirements as to the way in which actions shall be entitled. Perhaps the most striking is the action of ejectment. As is well known, in its fully developed form the names of both plaintiff and defendant were purely fictitious. The declaration stated a purely fictitious lease to a fictitious lessee ("John Doe," the nominal plaintiff), a ficti-

[74] 29 HARV. L. REV. 833.

[75] 79 Me. 159, 8 Atl. 684 (1887).

[76] Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783 (1898); Citizens' Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1059 (1897). In the case last cited a non-resident corporation, which was not entitled to sue in South Dakota on the claim because it had not complied with the South Dakota statutes, assigned the claim to a resident of the state. It was held that the latter could recover in his own name under the "real party in interest" clause. In these cases the assignor has the power by the assignment to give the assignee more than the assignor has.

tious entry and ouster of the fictitious plaintiff by the fictitious defendant. By means of the "consent-rule" the real defendant was ultimately substituted for the nominal defendant, but the real plaintiff was never substituted for the nominal plaintiff. Only by using this procedural form could the real plaintiff recover, and the judgment on its face merely directed that the nominal and fictitious plaintiff "John Doe" recover possession of his fictitious term. The writ of execution ("*habere facias possessionem*") followed the same form, directing the sheriff to put "John Doe" into possession.[77] Under this, however, it was the duty of the sheriff to put the real plaintiff into possession. The title of the action revealed, of course, who the real plaintiff was, as it described him as the lessor of the nominal plaintiff. We thus have a situation strikingly like that in the action of the assignee in the name of the assignor, where the nominal plaintiff (the assignor) apparently by the judgment recovers against the debtor, but the duty of the sheriff is to levy execution for the real plaintiff (the assignee). In both cases we are dealing with a procedural form. The analogy becomes still more striking when we recall that in the earlier days of ejectment the nominal plaintiff and defendant were real persons.[78]

Another equally striking analogy is found in the rule by which corporations sue or are sued not in the name of the real parties in interest — the stockholders or directors — but under a purely fictitious name, such as "The Copper King, Limited." [79] Similar also is the situation where by statute in one state a "joint stock association" which is not incorporated and so is really a partnership is permitted to sue and be sued under a fictitious name — *e. g.*, the "X Express Co.," or perhaps in the name of the president, or president and directors. The real parties in such an action are the members of the association; we are dealing merely with a procedural rule. In other jurisdictions without a similar statute, all the partners must join or be joined in their own names.[80] Purely procedural

[77] See the forms in ADAMS, EJECTMENT, Am. ed., 1821, 364–65, Forms No. 34 and 36.

[78] *Ibid.*, 1–17. Of course ejectment could be and was used *by* actual lessees. The reference here is to its use in cases where the real plaintiff had a freehold interest.

[79] Risdon Iron & Locomotive Works *v.* Furness, [1906] 1 K. B. 49; Bank of Australasia *v.* Harding, 9 C. B. 661 (1850). *Cf.* Hohfeld, "The Nature of Stockholders' Individual Liability for Corporate Debts," 9 COL. L. REV. 285, 301–03, where the cases last cited are discussed.

[80] Boston & Albany R. Co. *v.* Pearson, 128 Mass. 445 (1879). The judgment under

also is the common requirement that an action by an executor be entitled "A. B., as executor of C. D." This appears clearly when we recall that a suit by a trustee — who occupies an analogous position — is required merely to be entitled with the trustee's own name without indicating his fiduciary character.

This brings us to a consideration of the statutes which permit the action to be brought in the name of the assignee. Very little need be added to what Professor Williston has said as to the forms which these statutes take. One or two things must however be said. In dealing with the code provision requiring all actions (with certain exceptions) to be brought in the name of the real party in interest, Professor Williston says:

"It would seem certainly that a mere provision that the real party in interest must bring the suit in his own name can effect only a change of procedure."

Unfortunately for the learned author's contention, the fact seems to be that, rightly or wrongly, this innocent-looking provision has been applied by some courts so as to produce important changes in substantive law.[81] As applied, however, to the assignment cases, the decisions of the court which hold that the change in the name of the action is procedure merely quite bears out my contention that the requirement of suing in the assignor's name was a mere form. So far do they come from militating against my position that they actually support it. We may put the matter as follows. For historical reasons the common law procedure required a certain form of entitling an action brought by an assignee claiming by virtue of a common law assignment. A provision changing this and permitting the assignee to entitle the action with his own name does not alter the procedural requirements of other jurisdictions. From this it follows that in these other jurisdictions (if they have no similar statutes) the assignee must still obey the local common law procedural rule (*lex fori*) and use the

these statutes may simply read that the plaintiff recover from the officer of the association whose name as defendant the action bears, but execution does not run against his individual property, at least in the first instance, as the statutes usually require that satisfaction be had first out of the association property. McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728 (1892).

[81] See, for example Kingsland *v.* Chrisman, 28 Mo. App. 308 (1887); Tilden *v.* Stilson, 49 Neb. 382, 68 N. W. 478 (1896).

assignor's name. On the other hand, if by the statutory law of a given jurisdiction assignments not valid at common law are authorized in language which, fairly interpreted, says that the ownership of the claim may be transferred, the assignee suing in another jurisdiction (even though the latter has no similar statute) may well be held to be not subject to the ordinary common law procedural rule requiring an assignee to sue in the name of the assignor, on the theory that that rule applies only to assignments made in pursuance of the common law. It is not argued that this is a necessary result or indeed the actual result reached in all the cases, for it must be admitted that the analysis in most cases is not very clearly made. Many decisions, however, are in accord with it; and it seems to be the rule which will account for seeming inconsistencies. It was applied in an occasional case at the time when it could not be said that the common law had fully recognized the ownership of an assigned claim as vested in the assignee.[82] An example in relatively recent times is found in *Mayhew* v. *Pentecost.*[83] In that case an assignee in bankruptcy (*i. e.*, a statutory assignee under the federal bankruptcy law) who was also assignee in fact under an assignment made in Massachusetts (*i. e.*, a common law assignee) sued in Massachusetts in the name of the bankrupt. It was objected that the suit ought to have been in the name of the assignee, as the title to the bankrupt's *choses* in action passed to the assignee in bankruptcy, as a statutory assignee, by virtue of the federal bankruptcy act. The court, while admitting that the assignee could have sued in his own name, also recognized the assignment in fact as a common law assignment, permitting the assignee to sue in the name of the bankrupt assignor, in accordance with the common law rule of procedure which still obtained in Massachusetts at that time. The court, speaking through Mr. Justice Gray, said:

"The question whether a suit upon a *chose* in action shall be brought in the name of the assignor or of the assignee, is a question of *form* of remedy *only*, and is to be determined by the *lex fori*."

In effect the court decided that Massachusetts procedure required one form of entitling the action for common law assignments

[82] O'Callaghan *v.* Thomond, 3 Taunt. 82 (1810).

[83] 129 Mass. 332, 335 (1880). Italics are those of present writer.

and another for assignments operating under the federal bankruptcy act.

IV

In the second portion of his argument Professor Williston argues that the ownership of the assignee should not be recognized as "legal" because to do so would *necessarily* involve consequences which in his opinion would be not only unfortunate and unjust, but also violative of sound legal principles and inharmonious with the general trend of the decisions of the courts. He discusses cases involving:

1. The debtor's right to set off against the assignee claims against the assignor;

2. The effect of latent equities;

3. The effect of a subsequent total assignment on a prior partial assignment.

He states the law relating to the first of these problems as follows:

"The debtor is generally allowed to set off against the assignee not only claims existing at the time of the assignment, but those arising subsequently prior to the debtor's notice of the assignment. On the other hand a claim against the assignor acquired after notice of the assignment cannot be set off. There are a number of cases qualifying in one or another kind of case the right of set-off against the assignee, but the decisions need not be examined here, for all that is of importance to the present argument is that certainly everywhere the general rule is admitted that a claim matured at the time of assignment may be set off against the assigned claim. There seems *no possible ground on which to support this general rule, except that the legal title to the assigned claim still is in the assignor.*" [84]

It should be noted first of all that my statements as to the assignee's complete ownership of the claim, at law and in equity, were expressly confined to the situation *after notice* to the debtor. The situation before notice was stated as follows:

"Clearly here the assignor retains some of the powers of an owner — he can extinguish the claim by release, accepting payment, etc. Such acts on his part, of course, are wrongs against the assignee and render him liable to actions for damages. Translating this into the terms of our analysis, we may say that the assignor retains some of his legal powers but has lost his privileges as owner of the *chose*, and the assignee is as

[84] 30 HARV. L. REV. 101.

yet only partly owner because he lacks the immunities which are essential to complete ownership. The situation may be compared to that of a grantee of land under an unrecorded deed. In such a case we think of the grantee as owning the land, but his title is not complete: it is subject to a power on the part of the grantor to extinguish it by a conveyance to another purchaser who buys in good faith and complies with the recording act. Notice to the debtor plays the same part in the assignment of the *chose* in action that recording the deed does in the case of the grant of land." [85]

That portion of the statement of Professor Williston which I have placed in italics seems sufficiently answered by this quotation from my previous article. It is not necessary that at all stages of the transaction we attribute complete ownership to either assignor or assignee.[86] Surely Professor Williston would not contend that "there is no possible ground on which to support" the results of recording acts except that "the legal title" to the land is in the grantor in the case of an unrecorded deed.[87] Suppose, for example, that under the particular recording act a creditor of the grantor may obtain a valid attachment on the land after the deed has been given but not recorded. Is this because "the legal title" is in the grantor? Surely not. No more need we say so in the case of the assignment before notice has been given.[88]

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[85] 29 HARV. L. REV. 834.

[86] The American law of mortgages, especially in so-called "lien-theory" states, is understandable only if we recognize that neither mortgagor nor mortgagee has complete "legal ownership."

[87] The effect of a recording or registration act is clearly stated by Cozens-Hardy, L. J., in Capital & Counties Bank, Ltd. *v.* Rhodes, [1903] 1 Ch. 631, 655–56. Speaking of what happens when the "registered proprietor" has made a second transfer which has been registered, the first not having been registered, he says: "The transfer by registered disposition takes effect by virtue of an *overriding power*, and *not by virtue of any estate* in the registered proprietor. . . . Notwithstanding that the land has become registered land, it may still be dealt with by deeds having the same operation and effect as they would have if the land were unregistered, subject only to the risk of the title being defeated . . . by the exercise of the *statutory powers of disposition* given to the registered proprietor, against which the mortgagee must protect himself by notice on the register." (The italics are those of the present writer.)

[88] In this case the grantee, while vested with many of the jural relations which go to make up that complex called "ownership," lacks some of them. If he were complete owner he would have a *right* that creditors of the grantor should not attach as well as an *immunity* from a valid attachment by them. They would be under both a correlative *duty* to refrain from attaching and a correlative *disability* to make a valid attachment. As it is, with the deed unrecorded, they have both a *privilege* and a *power*

In making the comparison which I have between notice in the case of assignments and recording in the case of deeds, I must not be understood to say that notice plays the same part in all respects that recording does. All that is meant is that in relation to the power of the assignor or grantor to defeat the assignee or grantee by a subsequent assignment or grant, notice and recording are alike in terminating this power. It may well be that as between the assignee and a creditor of the assignor who garnishees the debtor, after the assignment but before notice of the assignment has been given to the debtor, the former might be preferred.[89]

The justification for permitting creditors of the assignor to set off the claims referred to is to be found ultimately in principles of fairness, of public policy, etc., rather than in the supposed requirements of logic. Doubtless many decisions of the courts have, because of defective analysis of the problem, been based, at least ostensibly, upon these supposed logical requirements. It is believed, however, that in many of these cases notions of fairness and business convenience played, subconsciously, a larger part than appears upon the surface.

The second unfortunate effect which Professor Williston conceives would *necessarily* be the result of recognizing the "legal ownership" of the assignee is stated as follows:

"The effect of equities of third persons against the assignee seems also to depend upon the legal or equitable character of the assignee's rights. Though it is well settled that an assignee is subject to the equities of the obligor, it is a matter of dispute how far the assignee is subject to equities of third persons against the assignor; as, for instance, where the assignor was himself an assignee of the *chose* in action under an assignment which he had procured by fraud, or where for any reason the assignor held the assigned claim subject to a trust, actual or constructive, in favor of a third person. . . . Even though the assignee paid value with no knowledge of any outstanding claim, it is still true that the defrauded original owner or person beneficially entitled to the assignment has an equity prior in time and, therefore, superior to that of

to attach; *i. e.*, the grantor has "*no-right*" that they shall not attach and also is under a "*liability*" to have a valid attachment made.

[89] The analysis here is similar to that in the preceding note relating to attaching creditors. The creditors of the grantor possess before notice *privileges* and *powers* of which notice deprives them. The authorities are collected in AMES. CASES ON TRUSTS, 2 ed., 413.

the ultimate assignee, if the latter's right is merely equitable. *If, however, the latter could be regarded as the owner of a legal right, his right would be superior to the original equity.* In fact, the latent or collateral equity against the assignor of an intangible *chose* in action has prevailed over the right of the subsequent purchaser in good faith, in the absence of an estoppel, in England and in a majority of the United States where the question has been raised." [90]

Here again the antithesis between "legal" and "equitable" appears. "Legal" means "not equitable" and *vice versa.* To make the objection apply to my conclusions we must amend the italicized portion so that it will read somewhat as follows. "If however the latter [the assignee] could be regarded as having a concurrently legal and equitable ownership, he would have priority over the holder of the original equity." The question at once arises, Why would he? Does the word "would" mean that that result would necessarily and inevitably follow? If so it must be because some principle of logic or some far-reaching and well-settled legal principle requires it.

Obviously logic in the abstract will not do. What legal principle is it that Professor Williston has in mind? Doubtless that relating to *bonâ fide* purchasers for value. Apparently, although he does not say so explicitly, he is assuming that there is a well-settled principle of our law that every *bonâ fide* purchaser for value of a "legal title" or "legal right" is protected from "equities." This was of course the view of the late Dean Ames, maintained with much vigor in his essay upon "Purchase for Value without Notice." It is there stated as follows:

"A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common law right acquired as an incident of his purchase." [91]

The facts seem to be that this wide and sweeping statement of a principle which Dean Ames regarded as "a far-reaching principle of natural justice" [92] is not justified by the cases. They have never established so broad a principle so far as the *actual decisions* go.[93]

[90] 30 HARV. L. REV. 102. The italics are those of the present writer.

[91] LECTURES ON LEGAL HISTORY, 254–55. [92] *Ibid.*, 272.

[93] See, for example, the cases on overdue commercial paper, note 98, *infra;* also Baker *v.* Snavely, 84 Kan. 179, 114 Pac. 370 (1911), which seems to be directly *contra*

To go into the matter fully would require a whole essay by itself. I can do no more than suggest what seems to me to be the true point of view, *viz.*, that the doctrine in question can be understood only in the light of its history. It has even been suggested by one writer that in many cases it produces entirely arbitrary results and that it is less equitable as applied, for example, to real estate held in trust than a rule which would divide the loss due to the rascality of a defaulting trustee between the innocent *cestui* and the equally innocent purchaser.[94] The truth seems to be that the doctrine as we have inherited it is the result of various more or less clear or confused ideas of expediency, justice, and supposed logic. As a principle in the living law of to-day it must be defended, if at all, upon grounds of real social policy and business convenience.

Recognizing that this is so, the real problem in connection with latent equities is this. Granted (for the sake of argument) that down to the time when *choses* in action became legally alienable the rule protecting innocent purchasers for value applied to all "legal titles" which could be transferred, does it follow that the same principle *must* be extended to cover the transfer of *choses* in action, when for the first time they become alienable at law? Logic does not require this, for confessedly the decisions do not cover the case. True, courts are likely to be misled by sweeping statements in prior opinions into thinking that the law upon the point really is settled, when as a matter of actual decision it is not. No doubt they have been so misled more than once. What ought to be done is to inquire into the real reasons back of the rule governing the rights of innocent purchasers and to try to find out whether the same reasons which justify the rule in the ordinary case — if indeed they do justify it — apply to this kind of property which can now for the first time be transferred at law. They may or may not; and the chances are we shall find that some kinds of *choses* in action ought to be brought within the rule and others excluded. Each class of *chose* in action — bond, share of corporate stock, insurance policy, etc., etc. — must be considered from the point of view of the needs of the business community in the long run. This may

to Dean Ames's statement (on page 257 of his LECTURES ON LEGAL HISTORY) as to the effect of depositing a deed in escrow.

[94] Edward Jenks, "The Legal Estate," 24 L. QUART. REV. 147, 154–55.

make our law more complex, but it will certainly be correspondingly more just. What is needed is teleological rather than formalistic jurisprudence.

Let us restate the problem from this point of view. Originally, probably, the "ownership" of the assignee was exclusively equitable. Gradually it became also legal, *i. e.*, concurrent. While exclusively equitable the chancellor would naturally apply the usual rule that as between equal equities the one prior in time prevails. After the ownership of the assignee has come to be fully recognized by the law court, the chancellor (not the court of common law) is confronted by the question whether the recognition of the assignee by the common law shall lead equity to alter its views. On the one hand the argument is made that where the equities are equal the legal title will prevail; on the other hand it is argued that the assignee's ownership is equitable in origin. What has happened is that some courts have taken one view, others the other, but that there is probably much less conflict than is supposed if we consider particular classes of *choses* in action separately.[95]

The court of equity was confronted with a similar problem when a new kind of legal *chose* came into existence in the form of commercial paper. Obviously the rule of *bonâ fide* purchase "free from equities"[96] had to be applied to it if transferred before due or it would not circulate freely as commercial paper should. On the other hand, if it were overdue the policy was not so clear. Professor Williston disposes of this by saying that since the title passes it is taken free from collateral equities if transferred to an innocent purchaser for value.[97] In some jurisdictions however it has been

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[95] Professor Williston's statement on page 104 that "a *bonâ fide* purchaser of a certificate of stock is preferred to one having an equitable right against his assignor" is not borne out for England by the case he cites — Colonial Bank *v.* Cady, L. R. 15 A. C. 267 (1890) — and seems opposed to the decisions in some other cases. See Ireland *v.* Hart, [1902] 1 Ch. 522. The prevailing American rule is as he states it. *Cf.* Dueber Watch Case Mfg. Co. *v.* Daugherty, 62 Ohio St. 589, 57 N. E. 455 (1900).

[96] The reference here is to real equitable claims. The common usage which calls the valid legal defenses of the person liable on the instrument "equities" merely because they are "cut off" if the instrument is transferred to a holder in due course is misleading and ought to be abandoned, as it leads only to confusion. The question what defenses are cut off by transfer is purely one of the "law merchant" as enforced by the courts; that of so-called "collateral equities" is a purely equitable problem for the chancellor.

[97] 30 HARV. L. REV. 103.

otherwise decided.[98] It is submitted that the decision should rest on a consideration of the real questions of policy involved.

The extension by statutes of the doctrine of innocent purchase for value to the cutting off of legal as well as equitable titles under recording acts, warehouse receipts acts, bills of lading acts, etc., shows that the real problem involved is purely one of business policy and not of logical deduction from supposed intrinsic characteristics of "legal" and "equitable" titles. The same thing is shown by the fact that under both the German and the French civil codes persons in possession of property but without other title may in many cases vest a valid title in innocent purchasers for value.[99]

Before leaving this part of the subject a few words must be said concerning the following statement of the learned writer:

"It has been held that a written assignment of a *chose* in action by one who seeks to avoid the assignment later on equitable grounds estops the claimant as against a *bonâ fide* purchaser who bought the *chose* in action on the faith of that writing."[100]

It was long ago pointed out by Dean Ames that estoppel is not an adequate explanation of the results reached in this group of cases.[101] It is difficult to see how a written assignment of a *chose* in action is in fact an assertion that it was obtained fairly or that it is not held in trust for the assignor or some third person. In the case of *Shropshire* v. *The Queen*[102] shares of stock were registered on the books of the company in the name of one who was in fact trustee for the corporation in question. The trust was not revealed in any way by anything on the certificates of stock. The trustee in breach of trust deposited the certificates with a third person (who had no notice of the trust) as security for a loan, and

[98] See 29 HARV. L. REV. 836, n. 49.

[99] FRENCH CIVIL CODE, § 2280; GERMAN CIVIL CODE, §§ 929–36. Lack of space will not permit me to set these forth or to comment upon them in detail. The provisions of the German code are clearly explained in SCHUSTER, PRINCIPLES OF THE GERMAN CIVIL LAW, 396–99. The slightest familiarity with provisions such as these must convince anyone that there is no *intrinsically necessary* connection between the doctrine of innocent purchase for value and so-called "equitable titles" as distinguished from "legal titles."

[100] 30 HARV. L. REV. 104.

[101] AMES, CASES ON TRUSTS, 2 ed., 310.

[102] L. R. 7 H. L. 496 (1875).

covenanted to execute a legal mortgage if required. After notice of the trust the creditor obtained from the trustee an instrument authorizing the transfer of the shares. In a *mandamus* proceeding it was held that the "equitable title" of the original *cestui* was superior to that of the creditor.

It is submitted that if a written certificate of stock asserting that a certain person owns a certain number of shares of stock is not a representation that the so-called "beneficial interest" is also vested in the "legal owner," then the same thing is true of a written assignment of a *chose* in action. It merely states that the claim has been or is now assigned; as to whether it is or is not held in trust there is no representation whatever. If there were, the estoppel theory would prove altogether too much, for obviously it would not be necessary for the one advancing money on the faith of the representation to obtain any transfer of the claim in order to assert the estoppel. It would come into operation as soon as the money had been advanced in reliance on the representation.[103]

This however does not prove that the result reached in the cases referred to by Professor Williston is erroneous. Since the legal as well as the equitable ownership passes to the assignee, we are at liberty to *extend* the protection of the rule as to innocent purchasers for value to this class of purchasers if it seems good policy so to do.[104] Very possibly it is good policy to do so; at least most courts seem to favor that view. After all, the real problem is, How freely do the demands of business, the needs of the business community, require that *choses* in action shall circulate? Whether we shall apply the doctrine of innocent purchase to a given class of *choses* in action ought to depend very largely upon the answer to that question.

A similar line of argument will, it is thought, dispose effectually of the third and last alleged unfortunate consequence which Pro-

[103] If the estoppel theory had been deemed applicable in Shropshire *v.* The Queen, the estoppel against the equitable claimant would have arisen as soon as the money was advanced in reliance upon the misrepresentation.

[104] On Professor Williston's theory that the assignee acquires at law only a "legal power to collect," the results he contends for can easily be justified if we also assume his doctrine as to innocent purchase for value. This "legal power to collect" having been obtained by fraud is held on a constructive trust. It and not the *chose* in action is the trust *res*. But it has always been the view that this legal power is alienable. It follows that an assignee of this trust *res* — the "legal power to collect" — acquire it free from the equities of the defrauded assignor.

fessor Williston foresees as the result of the legal recognition of the assignee. This relates to the relative rights of a prior partial assignee and a subsequent total assignee. On this point he says:

"It is, however, because of its effect on partial assignments that I am chiefly opposed to such a development of the law as shall give the assignee the legal ownership of the claim. The enormous weight of authority is to the effect that a partial assignee has but an equitable right. *While this rule persists it is impossible to deny that a subsequent total assignee if his ownership is legal will prevail over a prior partial assignment.*"[105]

Here again we find apparently the same assertion that by some kind of inevitable logic or intrinsic necessity the result stated will follow. If what has been said above is sound, it must be quite obvious that the *chancellor* (not the common law judge) would not be compelled, after the common law had recognized the assignee, to abandon the theory of priority which had previously been applied. It would be entirely possible to reach the result which my learned critic desires, *viz.*, to protect the prior partial assignee against the subsequent total assignee, and yet at the same time recognize the truth as to the legal character of the assignee's ownership. Time and space are wanting in which to elaborate the argument upon this question. It is believed to be unnecessary if previous points have been made clear.

A few words must, however, be said concerning the case of *King Bros. & Co.* v. *Central of Georgia Ry. Co.*[106] which held that the subsequent total assignee was entitled to prevail over the prior partial assignee. Professor Williston very properly criticises this case as laying down a rule not adapted to the needs of the business community. It is submitted that the decision of the court was not a necessary result, even under the Georgia code, and that it would not be reached if a sound analysis of the relations between law and equity were more familiar both to writers and to judges. It is a striking example of that formalistic jurisprudence which assumes that it is intrinsically necessary that "legal titles," whether acquired in accordance with common law principles or by virtue of some newly enacted statute, *must* prevail over "equities." It is submitted that the method of analysis and line of argument pursued throughout this article would, if followed by the court,

[105] 30 HARV. L. REV. 107.

[106] 135 Ga. 225, 69 S. E. 113 (1910).

have led to a rational decision based upon a consideration of the real meaning and object of the code provision in question.

In discussing partial assignments in my original article I made substantially the same statement that Professor Williston does, *viz.*, that nearly everywhere they are enforceable only in equity.[107] I am convinced now that this statement needs serious modification. Apparently — chiefly in code states having the "real party in interest" clause — a goodly number of jurisdictions are permitting the partial assignee to join with the assignor in an action at law to collect the claim.[108] This of course departs from the common law and is another example of a change of substantive law due, in part at least, to the code provision referred to. The device of the "power of attorney," by means of which the common law succeeded in making total assignments valid, could not be applied to partial assignments, as obviously there is no basis for permitting the assignee to collect the whole claim. Since the common law was not willing to permit the claim to be split into two or more claims to be enforced separately, the assignee could not sue for his share alone. To permit the assignee to join with the assignor in a suit in the assignor's name, indicating that the suit was in part for the benefit of the assignee, did not meet with approval for various reasons. Chief among these was a difficulty due to common law rules as to joinder of parties. If it were to be admitted that the partial assignee had a legal ownership of a portion of the claim, it would on common law principles be either a joint ownership or an

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[107] 29 HARV. L. REV. 836.

[108] Evans *v.* Durango Land & Coal Co., 80 Fed. 433 (1897) (applying Colorado code); Guagler *v.* Chicago, M. & P. S. Ry. Co., 197 Fed. 79 (1912) (applying Montana code); School District *v.* Edwards, 46 Wis. 150, 49 N. W. 968 (1879); Watson *v.* Milwaukee & Madison Ry. Co., 57 Wis. 332, 15 N. W. 468 (1883); 4 CYC. 101, n. 77; 5 CORP. JUR. 1000, n. 93; BLISS, CODE PLEADING, 3 ed., §§ 74–76. The same principle as to joinder of parties plaintiff has been applied to actions for damages brought by tenant for life and remainderman. Schiffer *v.* Eau Claire, 51 Wis. 385, 8 N. W. 253 (1881). *Cf.* Tucker *v.* Campbell, 36 Me. 346 (1853). In an occasional case in a code state, apparently without realizing fully the objections to such a rule, the partial assignee has been allowed to sue the debtor at law for his share of the claim without joining the assignor. Caledonia Ins. Co. *v.* Northern Pacific Ry. Co., 32 Mont. 46, 79 Pac. 544 (1904); Risley *v.* Phenix Bank, 83 N. Y. 318 (1881). On the other hand, some code jurisdictions refuse to permit the partial assignee to join with the assignor in an action at law. Pelly *v.* Bowyer, 7 Bush (Ky.) 513 (1870); Independent School Districts *v.* Independent School District No. 2, 50 Iowa 322 (1879); BLISS, CODE PLEADING, 3 ed., § 76.

ownership as tenant in common with the assignor. Joint ownership had incidents, as Professor Williston rightly says, that were not adapted to the end sought.[109] If assignor and assignee were tenants in common, each had a separate interest. On common law principles, how could they join? If not, then, as Professor Williston says, to "hold that the partial assignee is the legal owner of a part of the claim . . . is to subject the debtor to an indefinite multiplication of claims."[110] Consequently the common law courts surrendered in despair and left the assignee to courts of equity.

The chancellor, however, was entirely accustomed to permitting persons having separate property interests to join in suits in equity where that seemed convenient.[111] He therefore had no difficulty in protecting the assignee by holding that in equity there was an equitable duty on the part of the debtor owed to the assignee to pay him his share, and another duty to the assignor to pay him the remainder, and that the two might join in a suit in equity for the enforcement of the claim.[112] In other words, the equitable doctrine is that assignor and assignee each own separate interests but may join in a suit against the debtor to compel payment. What has happened in states having codes of civil procedure is that the rules as to parties have been so modified as to apply to many common law actions the equitable rule as to joinder of plaintiffs having separate interests.[113] With "the real party in interest" clause to rely upon, it is therefore not surprising that some courts permit the assignee to join with the assignor in a suit at law. Since the assignor's claim is primarily, before assignment, enforceable at law, this seems a convenient rule although it thereby makes the partial as-

[109] It must not be overlooked that on the orthodox common law theory that the partial assignee's ownership is exclusively equitable, the assignor retains an exclusively legal power to release the claim, even after notice to the debtor. Being exclusively legal, however, this power is ultimately ineffective if the assignee calls equity to his aid.

[110] 30 HARV. L. REV. 108.

[111] For example, separate owners of separate pieces of land may join in a bill to restrain acts which constitute a nuisance affecting all. Murray *v.* Hay, 1 Barb. Ch. (N. Y.) 59 (1845).

[112] Some of the cases are cited in 5 CORP. JUR. 1000, notes 89 and 93. Dean Ames suggested that a partial assignment is "in effect" an equitable charge. AMES, CASES ON TRUSTS, 2 ed., 148. If so, it seems that the debtor would still owe the whole sum in equity to the assignor. Apparently this is not the principle upon which the cases rest.

[113] See cases and references cited in n. 108, *supra*.

signee's ownership concurrently legal and equitable.[114] It has the great advantage of not changing the trier of fact from jury to judge just because a portion only of a claim is assigned. This is especially important where the claim assigned is for damages due to a tort. It fully protects the debtor from a multiplicity of suits. It has the additional advantage, from Professor Williston's point of view, that it makes it less difficult to persuade a court that a prior partial assignment has precedence over a subsequent total assignment. The argument now runs: Since the partial assignee under the new doctrine gets a legal ownership of a portion of the claim, the assignor has left the legal ownership of a portion only, and the subsequent "total assignee" gets only that remainder. Needless to say, the present writer does not indorse such reasoning as conclusive, for the problem ought to be settled on a less mechanical basis; but undoubtedly it would appeal to many courts.

It was originally my intention to discuss in this second article the so-called rule in *Dearle* v. *Hall*[115] and to show how the analysis here presented enables one to visualize the real problem involved. The rule referred to is the one which prefers, as between two or more total assignees, the one who first notifies the debtor. Recurring to the discussion above of the situation before notice of an assignment has been given to the debtor, it is clear that in jurisdictions where the rule in question is in force the assignor after the first assignment retains, in addition to the powers mentioned, a power to confer upon a second assignee a power to acquire a valid title to the claim by giving notice first. There is no difficulty of conceiving of the existence of this power even though many concurrently legal and equitable rights and other jural relations vested in the first assignee in spite of the lack of notice. Which one of the two innocent assignees should be preferred should depend not upon whether the first assignee acquired a concurrent or exclusively equitable incomplete ownership, but upon those broader questions of policy already referred to so frequently. An example of

[114] It is immaterial to the debtor how assignor and assignee divide the money. Apparently the judgment reads that each recover his share. If they cannot agree how the judgment should be entered, the code procedure provides a method for determining this. BLISS, CODE PLEADING, 3 ed., § 74; School District *v.* Edwards, 46 Wis. 150, 158, 49 N. W. 968 (1879).

[115] 3 Russell 1, 48 (1827). The rule in question is discussed in AMES, CASES ON TRUSTS, 2 ed., 326; also in 60 U. PA. L. REV. 668, where some of the recent cases are cited.

the type of reasoning which ought to prevail is found in cases which hold that, although under the code provisions of the jurisdiction in question the assignee acquires a "legal title" (*i. e.*, concurrently legal and equitable), the rule as laid down in *Dearle* v. *Hall* prevails, the decision being put on grounds of policy rather than mere logic.[116]

In closing this somewhat long discussion the present writer wishes to emphasize again the importance of both an exact scientific analysis of fundamental legal concepts and an equally exact scientific terminology in which to express them. It is fully realized that this goal is an ideal one, difficult to attain, and that doubtless in the present discussion many lapses have occurred. At the present time, when we are attempting not only to adapt our law to modern social and industrial conditions, but also to restate much of it in the form of codes of uniform state laws, the need for analytical jurisprudence is greater than ever before. If this work is to be done worthily, it must be carried on by men adequately trained to analyze with accuracy the fundamental concepts which lie at the basis of our legal system in a terminology which will not mislead. Thus and thus only will genuine progress be made.

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[116] Graham Paper Co. *v.* Pembroke, 124 Cal. 117, 56 Pac. 627 (1899); Widenmann *v.* Weniger, 164 Cal. 667, 130 Pac. 421 (1913). See the comment on the California cases in 1 CAL. L. REV. 364.